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Public Service Commission

July 10, 1997

Mr. William F. Caton
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BY AIRBORNE EXPRESS

Re: CC Docket No. 96-262 and CC Docket No. 94-1 - Access Charge Reform Price Cap
Performance Review for Local Exchange Carriers.

Dear Mr. Caton:

Enclosed please find the original and seventeen copies of Petition of Florida Public Service Commission for Clarification and/or Reconsideration in the above dockets. Please date-stamp one copy and return in the enclosed self-addressed stamped envelope.

Sincerely,

Cynthia Miller
Senior Attorney

CBM:jmb
Enclosure

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List ABCDE

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D.C. 20554**

In the Matter of:)	
)	
Access Charge Reform)	CC DOCKET 96-262
Price Cap Performance Review)	CC DOCKET 94-1
for Local Exchange Carriers)	
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**PETITION OF FLORIDA PUBLIC SERVICE COMMISSION
FOR CLARIFICATION AND/OR RECONSIDERATION**

The Florida Public Service Commission (FPSC) hereby files this Petition for Clarification of the May 7 Federal Communications Commission (FCC) Order in the above dockets. This petition is filed pursuant to Rule 1.429 of the FCC's regulations.

While the FPSC believes that the FCC generally has avoided infringing on state jurisdiction in this Order, there are some paragraphs that we believe should be deleted. These paragraphs are: (1) unnecessary to the access charge rulemaking; (2) relate primarily to a different docket (the universal service docket, CC Docket No. 96-45); and (3) depending on what actions the FCC is contemplating, could be beyond the scope of FCC authority pursuant to the Telecommunications Act of 1996. The FCC has no business, at any point, instituting "a vast-set of wide-ranging pricing rules applicable to interstate and intrastate services."

They are Paragraphs 10, 11, and 381, and are quoted below:

- ¶ 10 Nor, by our orders today, do we attempt to identify or eliminate the implicit universal service support mechanisms established by state commissions. We recognize that states are responsible for identifying implicit intrastate subsidies. . . . [W]e believe the Commission

has discretion under the statute to employ pro-competitive deregulatory policies to aid in the reform of the existing, complex system of universal service. Where pro-competition policies, such as those set forth in Section 251, 252 and 253, can force prices for telecommunication services to competitive levels, and, as a result, eliminate or, at least, substantially eliminate implicit support, the Act grants us the authority to rely on such policies over a period of time. We find that the Act does not require, nor did Congress intend, that we immediately institute a vast set of wide-ranging pricing rules applicable to interstate and intrastate services provided by incumbent LECs that could have enormously disruptive effects on both ratepayers as well as the affected LECs. . . . Reliance on competition is the keystone that unifies our universal service access reform orders. (Emphasis supplied)

- ¶ 11 Nevertheless, implicit intrastate universal service support is substantial. States have maintained low residential basic service rates through, among other things, a combination of: geographic rate averaging, high rates for business customers, high intrastate access rates, high rates for intrastate toll service, and high rates for vertical features and services such as call waiting and call forwarding. By not mandating immediate Commission action to eliminate these policies and instead by ordering that the Commission and the states together achieve universal service goals, Congress intended that states, acting pursuant to Section 254(f) of the Communications Act, must in the first instance be responsible for identifying intrastate implicit universal service support. Indeed, by our decisions in this Order and in our companion Universal Service Order, we strongly encourage states to take such steps. (Emphasis supplied)
- ¶ 381 In our Universal Service order, we conclude that the Federal mechanisms should support 25% of the difference between forward-looking economic cost of serving the customer and the appropriate revenue benchmark. . . . [W]e direct incumbent LECs to use any universal service support received from the new universal service mechanisms to reduce or satisfy the interstate revenue requirement otherwise collected through interstate access charges.

The FCC jurisdictional viewpoint that it may review intrastate subsidies¹ at some future point is of concern, as is the future potential mandate for LECs to obtain a portion of their Federal universal service support from the states via a Federally-structured program. States have the legal authority and are best-positioned to guide these reviews and determinations. Again, the jurisdictional framework is what concerns us.

The only provisions in the Act cited by the FCC in this Order for this intrastate authority are those listed in ¶ 10 as Sections 251, 252, and 253. However, Section 251 is on Interconnection and most of the FCC's actions in the interconnection area (the Local Competition Docket) have been stayed by the Eighth Circuit. See Iowa Utilities Board v. FCC, 109 F.3d 418 (8th Cir. 1996). The FCC's interpretation of its jurisdictional authority thus has been questioned at this stage. Section 252 is on Procedures for Negotiation, Arbitration, and

¹ See Competitive Telecommunication Assn. v. FCC, Docket No. 96-3604 (Eighth Circuit Court of Appeals, June 27, 1997). The Court states in footnote 5: While we uphold the FCC's decision to allow incumbent LECs to collect, on an interim basis, access charges for interstate calls, we vacate the Commission's attempt to regulate the temporary recovery of access charges for intrastate calls contained in paragraphs 729 through 732 of the First Report and Order and C.F.R. 51.515(c) (1996) as being beyond the scope of the Commission's jurisdiction. See 47 U.S.C. 152(b) (1994). While we recognize the FCC is merely allowing the state commissions to continue to allow the LECs to collect access charges on intrastate calls, we believe that such an assertion of regulatory power is beyond the scope of the FCC's jurisdiction. Opinion at pg. 19.

Approval of Agreement. That section is generally one that authorizes state commissions to take actions upon the failure of private parties to negotiate. Only Section 253 on Removal of Barriers to Entry gives the FCC an authorizing statute to address. Yet that statutory section envisions only a case-by-base approach rather than a generic preemptive approach by the FCC. It provides, in Section 253(a), that "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." However, in Section 253(b), on State Regulatory Authority, the Act provides:

Nothing in this section shall affect the ability of a state to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, and ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Section 253(d) sets forth the FCC's preemption authority:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

This preemption authority is not something that can be generically issued prior to an identification of a specific

statute, regulation or legal requirement that offends. That scenario is not present here.

In addition, the Telecommunications Act refers in Section 254(b)(5) to an independent state mechanism to preserve and advance universal service.

Last, but not least, Section 2(b) was retained in the Telecommunications Act of 1996. It provides in 47 U.S.C. 152(b):

Except as provided in sections 223 through 227, inclusive, and section 332, and subject to the provisions of section 301 and title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier.


The Court in the recent Eighth Circuit case, Competitive Telecommunications Assn. v. FCC, Docket No. 96-3604 (Eighth Circuit Court of Appeals, June 27, 1997) gave great and continuing importance to Section 2(b).

Thus, it is mystifying why the FCC, at the very time it is urging a Federal-State partnership and cooperation, would now place these unnecessary and jurisdictionally aggressive paragraphs in its Order. Except for Section 253 authority to review state laws and regulations on a case-by-case basis to identify barriers to entry, the FCC has no authority to look at intrastate subsidies or require LECs to seek recovery of their dollars for a Federally-dictated program through the states.²

² See Printz v. U.S., Docket Nos. 95-1478 and 95-1503 (U.S. 1997), in which the Court held that the U.S. Government

This framework in the Order should be deleted. We urge that, in the spirit of comity and cooperation, you delete these paragraphs from the Order.

Respectfully submitted,


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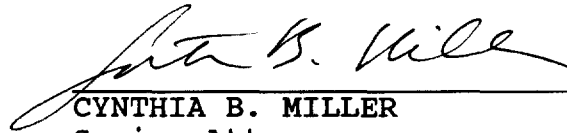
provisions "commanding state and local law enforcement officers to conduct background checks on prospective handgun purchases" violate the Constitution. The Court stated that "the Federal Government may neither issue directives requiring the states to address particular problems, nor command the states' officers, or those of their political subdivisions to administer or enforce a federal regulatory program." Opinion at pg. 37.

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for Local Exchange Carriers)	
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition of Florida Public Service Commission for Clarification and/or Reconsideration has been furnished to all parties listed on the attached list this 10th day of July, 1997.



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